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910 UNITED STATES DISTRICT COURT
11 DISTRICT OF MASSACHUSETTS
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15 MICHAEL HUNTER)
16 Petitioner,)
17 v.) Civil Action No. 05-10904-NG
18 LUIS SPENCER)
19 Respondent,)
20
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23 PETITIONER'S MEMORANDUM OF LAW
24 IN SUPPORT OF HIS MOTION TO
25 DENY RESPONDENT'S MOTION TO DISMISS

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27 This memorandum is submitted in support of Michael Hunter's
28 (the petitioner) Motion To Deny The Motion To Dismiss filed by
29 Luis Spencer (the respondent). The Petitioner as grounds
30 asserts his petition is not time barred and further asserts the
31 request by the Court in its Order for the respondent to file
32 such documents which reflect on the issue as to whether the
33 petitioner exhausted available state remedies resulted in the
34 respondent asserting, "[he] will not, in the interest of economy,
35 answer the petition or address any additional affirmative
36 defenses." (respondent's memorandum, note 1).

PRIOR PROCEEDINGS

1 Against the background of the prior proceedings made on
2 pages 1-2 of the Respondent's Memorandum, the Petitioner adds
3 that Magistrate Judge Lawrence P. Cohen on January 11, 1999
4 found that matters raised in his earlier related Petition were a
5 mixed petition within the meaning of *Rose v. Lundy*, 455 U.S. 509
6 (1982) and dismissed the petitioner's petition for want of
7 exhaustion which, tolled the statute of limitations (see *Hunter*
8 *v. Hall*, 98-cv-12500). Consequently, on October 23, 2003, the
9 petitioner filed a Motion For A New Trial in order to exhaust
10 his remedies concerning ineffective assistance of counsel. This
11 motion was assigned to Judge Brassard who while denying the
12 motion on June 25, 2004, entered on the docket, "After review of
13 the papers, including the decision of the Committee not to
14 assign counsel, Denied" (see docket entry 99).
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16 The Petitioner filed a Notice Of Appeal on July 13, 2004.
17 The Middlesex Superior court clerk contacted the Petitioner and
18 informed him that they would docket the appeal but before they
19 could proceed, the Petitioner first had to petition the SJC for
20 leave. On July 25, 2004 and again on October 22, 2004, the
21 Petitioner petitioned the SJC for Leave To Proceed On Appeal In
22 *forma pauperis* and For Leave To Be Heard On The Original Record.
23 The SJC clerk would not respond nor contact the Petitioner and
24 it became clear that the decision of the Committee for Public
25

1 Counsel Services not to assign counsel had become a determining
2 factor concerning his motion for a new trial by Judge Brassard
3 and that it was now futile to continue contacting the SJC since
4 the record made it clear that counsel would not be assisting him
5 with the appeal.

6 **ARGUMENT**

7 First, as mentioned above, for want of exhaustion, the
8 statute of limitations was tolled and this Petition is not time
9 barred.

10 Second, the Respondent concedes in footnote 2 of his
11 memorandum of law, that the SJC did not respond to the motions
12 the petitioner filed even when the Court knew of the
13 Petitioner's attempts to appeal the final judgment of June 25,
14 2004 in August 2004.

15 Therefore, the interest of justice should out weigh the
16 interest of economy the respondent asserts is clear where 1),
17 the state court's use of a decision by the Committee for Public
18 Counsel Services to not assign counsel to the petitioner was
19 used by Judge Brassard to assist him with making a determination
20 in the Petitioner's motion for a new trial (see docket entry 99)
21 which should not have been a determining factor and 2), where
22 due to a lack of any response or contact from the SJC concerning
23 the appeal of the superior court's final decision the petitioner
24 was not afforded any redress until now.

CONCLUSION

For the foregoing reasons, the Respondent's Motion To Dismiss should be denied.

Dated this 2 day of June, 2005

Michael R. Hansen

Michael K. Hunter,
In forma pauperis
P.O. Box 43
Norfolk, MA 02156

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served on

Susanne G. Reardon
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, MA 02108

By first class mail, postage prepaid on June 2, 2005

Michael K. Hunter
Michael K. Hunter,
In forma pauperis
P.O. Box 43
Norfolk, MA 02056